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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1250

VELSICOL CHEMICAL CORPORATION, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

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1. The Environmental Protection Agency ("EPA"), in opposing certiorari in this case, invites this Court to disregard the extremely important issue presented by petitioner's first question: the construction of the burden of proof provision of the Administrative Procedure Act ("APA"). The Court of Appeals concluded that § 7(c) of that Act, 5 U.S.C. 556(d), although placing the "burden of proof" on "the proponent of a rule or order", permits the EPA Administrator to shift the

"burden of persuasion" to the party opposing the Administrator's proposed order for suspension of a pesticide registration. EPA seeks to justify its position by asserting that the court's conclusion was mere dictum. This assertion, however, is in obvious conflict with the Court of Appeals' own view of its conclusion for, in its supplemental opinion, the court refers to the decision on this issue as a holding: "As to the APA, our opinion *holds* that the 'burden of proof' it casts upon the 'proponent' is the burden of coming forward with proof, and not the ultimate burden of persuasion."[1] (Pet. App. 28, emphasis supplied).

Even if the court below had not so clearly labeled its conclusion a holding, it could in no sense be called dictum. The judgment below (Pet. App. 41), which this Court is asked to review, was entered with and predicated only upon the lower court's first opinion, in which the construction of the APA was the sole basis for the court's conclusion on the allocation of the burden. This conclusion was reconsidered in a "Supplemental Opinion" accompanying an order denying rehearing (Pet. App. 27); and, in a more elaborate discussion, the prior conclusion was expressly reaffirmed. Only in a separate part of its supplemental opinion did the Court of Appeals advance another theory: it declared, as an alternative, that even if[2] the APA would nor-

[1] See also Part II of the Court of Appeals Supplemental Opinion: "[W]e *held* in our panel opinion that § 7(c) was not intended to govern the allocation of the burden of persuasion . . . ." (Pet. App. 33; emphasis supplied).

[2] As stated by the Court of Appeals: "This conclusion [as to FIFRA] would be sound *even if* the APA, by itself, indisputably put the burden of persuasion on the proponent of suspension. It is strengthened by our *conclusion* (Part I) that the APA does not have that consequence." (Pet. App. 37, emphasis supplied)

mally place the "burden of persuasion" on the agency, suspension hearings under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. 136d(c) (Supp. V, 1975), fell within the exception in § 7(c) of the APA in which the burden was "otherwise provided by statute." The Court's decision on the proper construction of § 7(c) of the APA is no more dictum than its conclusion as to FIFRA. As this Court has said: "[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum.*" *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949). The stare decisis effect of one alternate ground is as great as the other; if *certiorari* is denied in this case, the federal agencies, the bench and the bar will treat the Court of Appeals' interpretation of the APA as authoritative. It is that effect that establishes the significance of this case.

The importance of the proper construction of the APA in allocating the "burden of proof" has not been, and cannot be, disputed by the EPA. The allocation of the "burden of proof" unquestionably has a substantial impact in determining the course of a multiplicity of administrative proceedings, affecting every facet of our society.

2. The Environmental Protection Agency attempts in a footnote to discount the importance of the allocation of the burden of proof as inconsequential herein. It flatly asserts that the "decision on the question concerning the burdens of proof and persuasion would not be determinative of the outcome of this case . . . ." (Brief for EPA 8, n.11). The claim that the result would have been the same if the EPA had proceeded on the basis that it had the "burden of proof" (per-

suasion) is pure conjecture. Neither the Administrative Law Judge ("ALJ") nor the Administrator, in holding that the burden of persuasion was on petitioner, suggested that their findings would have been the same had the burden been allocated to respondent. (Pet. App. 96-97, 145-46). To argue respondent's assertion at this juncture of the proceedings by marshalling the evidence of record and identifying deficiencies in the assessment of the evidence would only tax the patience of this Court. Suffice it to say that respondent's assertion simply ignores the fact (nowhere mentioned in EPA's brief) that this case was sufficiently close that respondent lost it at the hearing stage before the ALJ. The ALJ even after applying the burden of persuasion against Velsicol, recommended dismissal of the suspension notice.[3] Had the ALJ's findings been more favorable to petitioner because of a different allocation of the "burden of proof", the Administrator, who generally adopted the findings but refused to accept the recommendation of the ALJ, may well have reached other conclusions in assessing the benefits and risks attributable to different uses of the pesticides.[4]

[3] The ALJ found that "[w]ith respect to whether [chlordane and heptachlor] are carcinogens in laboratory animals and a potential carcinogenic risk to man . . . [w]e merely state that at this time we do not so conclude and, by reason thereof, we cannot find an imminent hazard with respect thereto." (Pet. App. 106-107).

[4] The Administrator was required to make a separate risk-benefit assessment for each registered use of the pesticides. For example, with respect to the major agricultural use of heptachlor and chlordane—the protection of corn crops against cutworm infestation—the evidence was in such comparative equipoise that the Administrator decided in Velsicol's favor for 1976 but against Velsicol for 1977. Surely it cannot be said that placing the burden

(footnote continued)

In the decision-making process, the allocation of the burden of proof is a pivotal element.[5] But this Court need not now decide whether the placement of the burden was pivotal in this case because an agency action based on an error of law must be overturned, even if the evidence arguably could have sustained the order under a different legal theory. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 92, 94-95 (1943).[6] As this Court has held, "[a]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." 318 U.S. at 95.[7]

3. Finally, EPA argues that FIFRA falls within the APA's "except as otherwise provided by statute" clause. But respondent does not point to any language in FIFRA which does "otherwise provide." It ig-

differently could not have led to findings in Velsicol's favor for 1977 as well.

The fact that the allocation of the burden of proof was critical in the instant case was acknowledged recently in a public address by the chief trial attorney who had presented the case for EPA in the admininstrative proceedings. *See* Address of Jeffrey Howard, Esquire, "EPA-Heptachlor-Chlordane", 10 *et seq.*, before the Center for Continuing Education, "Seminar on the Federal Regulation of Environmental Carcinogens" (April 12, 1977). (A copy of the address has been lodged with the Clerk.)

[5] *See, e.g., Old Ben Coal Corp.* v. *Interior Board of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975); *Day* v. *National Transportation Safety Board*, 414 F.2d 950 (5th Cir. 1969).

[6] *See* also, *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 248-49 (1972); *Kovac* v. *Immigration & Naturalization Service*, 407 F.2d 102, 104 (9th Cir. 1969).

[7] If petitioner's contention on the burden of persuasion is upheld, the Court may of course choose to vacate and remand for new administrative findings.

nores the fact that Congress in enacting the 1972 amendments to FIFRA making suspension proceedings subject to APA standards explicitly set forth only one exception:

> "The [suspension] hearing shall be held in accordance with the provisions of subchapter II of chapter 5 of Title 5, *except* that the presiding officer need not be a certified hearing examiner." 7 U.S.C. 136d(c)(2) (emphasis supplied).

The additional exception which EPA urges was not enacted.

Respectfully submitted,

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